

**MINUTES
of the
THIRD MEETING
of the
TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE**

**September 22, 2014
Pueblo of Laguna Administration Building
22 Capital Drive
Laguna, New Mexico**

The third meeting of the Tobacco Settlement Revenue Oversight Committee was called to order by Senator Cisco McSorley, co-chair, on September 22, 2014 at 9:30 a.m. at the Pueblo of Laguna Administration Building in Laguna.

Present

Sen. Cisco McSorley, Co-Chair
Rep. Elizabeth "Liz" Thomson, Co-Chair
Rep. Gail Chasey
Sen. John C. Ryan
Sen. John Arthur Smith
Rep. Monica Youngblood

Absent

Advisory Members

Rep. Paul C. Bandy
Sen. Linda M. Lopez
Sen. Mary Kay Papen
Rep. Jim R. Trujillo

Rep. Kelly K. Fajardo

Staff

Caela Baker, Staff Attorney, Legislative Council Service (LCS)
Amy Chavez-Romero, Assistant Director for Drafting Services, LCS
Julio Garcia, Intern, LCS

Guests

The guest list is in the meeting file.

Handouts

Copies of all handouts are in the meeting file.

Monday, September 22

Welcoming Remarks

Paul Pino, first fiscale, Pueblo of Laguna, welcomed the committee to the Pueblo of Laguna. Mr. Pino spoke about concerns about the adverse health effects of smoking when young tribal members use commercial tobacco. He noted, however, that sometimes smoking plays an important role to members of the Pueblo of Laguna, especially with respect to religious ceremonies. In response to a question from a committee member, Mr. Pino indicated that native-grown tobacco does not contain pesticides or chemicals. He also indicated that native-grown tobacco burns differently than commercial tobacco.

Science and Health Effects of E-Cigarettes

Donna Upson, M.D., Division of Pulmonary, Critical Care and Sleep Medicine, Department of Internal Medicine, University of New Mexico, made a presentation regarding the potential harms and benefits of electronic cigarettes. Dr. Upson also acts as a tobacco dependence specialist for the New Mexico Veterans' Administration health care system.

Dr. Upson began her presentation with a description of electronic cigarettes. She noted that electronic cigarettes are battery-operated products that turn nicotine, flavor and other chemicals into inhalable aerosols. Dr. Upson distinguished nicotine inhalers from electronic cigarettes, noting that nicotine inhalers deliver non-combusted aerosolized nicotine to a user's oropharyngeal mucosa and are approved and regulated by the federal Food and Drug Administration (FDA) for treatment of tobacco dependence. On the other hand, Dr. Upson noted that electronic cigarettes lack FDA oversight. She stated that users of electronic cigarettes inhale vapor into their lungs, where nicotine is absorbed. In addition, she stated that electronic cigarette nicotine cartridges are replaceable and provide nicotine for 250 puffs of vapor, equivalent to the amount of nicotine in one pack of cigarettes. Dr. Upson noted that electronic cigarettes have variable amounts of nicotine and potentially harmful toxins. She also expressed that there is some concern about the possible role of electronic cigarettes in establishing nicotine addiction in young people.

Dr. Upson indicated that while electronic cigarettes are marketed as a healthier alternative to conventional cigarettes, it is unknown whether electronic cigarettes are, in fact, safer or are otherwise effective in treating tobacco dependence. She indicated that studies conducted are characterized by small sample sizes, a lack of control groups and limited follow-up.

Dr. Upson stated that potential benefits of the role of electronic cigarettes in reducing conventional smoking could be outweighed by increases in nicotine dependence and a renewed acceptance of smoking. She stated that according to a national youth tobacco survey, 1.78 million middle and high school students nationwide have tried electronic cigarettes. Another study by the American Medical Association found that current electronic cigarette use was associated with heavier smoking among conventional smokers. It also found that for those who had used electronic cigarettes, 9.3 percent reported never smoking conventional cigarettes. The

study also indicated that 76.3 percent of current electronic cigarette users were also smoking conventional cigarettes.

Dr. Upson indicated that adverse impacts with respect to brain development, birth weight, fertility, type 2 diabetes, hypertension, neurobehavioral defects, respiratory dysfunction, neuroregulation, peptic ulcers and gastrointestinal cancers are attributable to nicotine. She also stated that the FDA has detected low levels of other toxic substances in electronic cigarettes. Dr. Upson additionally discussed possible adverse effects of electronic cigarettes on lung function.

In a four-country survey of people who smoked conventional cigarettes and used electronic cigarettes, Dr. Upson said that 80 percent of the people surveyed indicated that they smoked electronic cigarettes because they considered them less harmful than combustible cigarettes. Seventy-five percent of the individuals surveyed said that they smoked electronic cigarettes to reduce their smoking of conventional cigarettes, while 85 percent used electronic cigarettes to quit smoking. Dr. Upson then discussed the results of a 24-week study of 40 individuals who smoked and were given electronic cigarettes. The study showed a 50 percent reduction in cigarette use. After a 24-week follow-up, 23 percent of the individuals quit conventional cigarettes. Finally, Dr. Upson discussed the results of a comparative study between electronic cigarettes and nicotine patches. She indicated there was a low quit rate for both electronic cigarette and nicotine patch users. She stated that electronic cigarettes and smoking have the same effects upon a human's cardiovascular system.

According to Dr. Upson, clinical trials show that electronic cigarettes contain lower levels of possible carcinogens and smaller acute lung effects than conventional cigarettes. However, she said that there is no data demonstrating the efficacy of electronic cigarettes as a tool for cessation.

Next, Dr. Upson identified other concerns regarding electronic cigarettes. She indicated that some groups have expressed concern that electronic cigarettes might perpetuate nicotine dependence among cigarette smokers and decrease incentives to stop smoking, since electronic cigarettes might be used where conventional cigarettes are not allowed. She also indicated that there is a concern that electronic cigarettes might act as a gateway to conventional cigarette use for young people. Dr. Upson presented a number of statistics regarding electronic cigarette use among middle school and high school students.

Dr. Upson discussed concerns about the role of the tobacco industry in marketing electronic cigarettes. She indicated that a number of cigarette manufacturers are manufacturing electronic cigarettes. She stated that some concerns have arisen over the marketing of electronic cigarettes to children and glamorization and social acceptance of electronic cigarette use among adults. She also expressed that since electronic cigarettes are not currently regulated by the FDA, there is little information about the favorable or unfavorable impacts of electronic cigarette use or whether electronic cigarette use, in fact, leads to conventional cigarette use.

Dr. Upson described regulations recently proposed by the FDA for electronic cigarettes. She indicated that it is anticipated that the FDA will regulate electronic cigarettes as tobacco products, rather than as tobacco dependence treatment tools. The proposed regulations would:

- prohibit sales of tobacco products to anyone under the age of 18;
- prohibit certain vending machine sales;
- require electronic cigarette manufacturers to register with the FDA and report the products they sell;
- require disclosure of electronic cigarette ingredients to the FDA;
- eliminate free sampling of tobacco products;
- require "premarket review" for new tobacco products or for products making a "modified risk or harm" claim; and
- require imposition of user fees for newly deemed products.

The rules would not prohibit advertising of electronic cigarettes or the use of flavoring in electronic cigarettes. Dr. Upson noted that there have been recommendations from medical and health associations, including the American Lung Association and the American Thoracic Society, to regulate electronic cigarettes in the same manner as conventional cigarettes. For instance, the American Heart Association has called for regulations of the marketing of electronic cigarettes to young people and has recommended a federal ban on the sale of electronic cigarettes to minors. Additionally, it recommends application of all existing rules and regulations for tobacco-related products to electronic cigarettes.

Committee members engaged in a discussion with Dr. Upson following her presentation. A committee member commented that there is some concern about the possible connection between the use of nicotine products and adverse health effects in pregnant women. Dr. Upson added that nicotine use has been linked by some studies to adverse effects on behavioral health and increased rates of obesity and diabetes among children. Committee members expressed other concerns with nicotine dependence and its possible association with electronic cigarette use and the use of flavors in electronic cigarettes. In response to a question from a committee member, Dr. Upson noted that 80 to 95 percent of people who smoke regularly start smoking by the age of 15. The rest begin smoking before the age of 25.

Committee members also asked Dr. Upson about the status of proposed FDA regulations. In response to questions from the committee, Dr. Upson noted that the public comment period for the proposed regulations has closed. She also expressed that there is some potential for advertising and marketing restrictions with respect to electronic cigarettes and state regulation of those products. Another committee member asked about any public comments made in response to the FDA's proposed regulations. Dr. Upson stated that, generally, anti-smoking groups made comments in favor of making stricter rules, but there were also thousands of individual comments in favor of electronic cigarettes. In response to a question from a committee member, Dr. Upson indicated that electronic cigarettes could, at some point, be regulated as tobacco products. Another committee member asked Dr. Upson why the FDA did not include

prohibitions against electronic cigarette advertising and flavoring in its proposed rules. In response, Dr. Upson indicated that court opinions might not be favorable to such regulatory prohibitions.

In response to a question from a committee member, Dr. Upson stated that existing data on the effects of electronic cigarettes on the respiratory system have results either showing no effects or slight increases in airflow compared to tobacco cigarettes. A committee member raised a concern about the possible role of nicotine or other substances in the use of other drugs.

Committee members discussed the issue of taxation of electronic cigarettes. A committee member expressed reservations about taxing electronic cigarettes and commented that taxation of electronic cigarettes could disproportionately affect poor populations. The committee member further raised concerns about the impact of electronic cigarette use among such populations. In response to a question from another committee member, Dr. Upson stated that increased taxes could result in a reduction in smoking among young people. She said that a 10 percent increase in price generally results in a six to eight percent reduction in use. Some members expressed that tobacco cigarettes and electronic cigarettes should be taxed at comparable rates. Staff was requested to research the manner in which nicotine patches are taxed and if the New Mexico Institute of Mining and Technology still receives royalties as a result of its development of the nicotine patch. Committee members also raised the question of whether increased taxes on electronic cigarettes could lead to increased traffic of those products into the United States from other countries.

The committee discussed the possible use of electronic cigarettes as tobacco cessation devices. Committee members also discussed the physiological impacts of electronic cigarettes versus tobacco cigarettes. Dr. Upson stated that there are still concerns with the levels of nicotine in electronic cigarettes. A committee member asked about the process for extracting nicotine from tobacco, and Dr. Upson briefly described the chemical process that occurs.

Overview of Tobacco Cessation Programs Funded Through the Indian Affairs Department (IAD)

Michelle Redmond, director of government affairs, IAD, and Allie Moore, Keres Consulting, provided the committee with an overview of tobacco cessation funding programs funded through the IAD. Ms. Redmond provided an overview of the goals of the IAD in promoting cessation and prevention of commercial tobacco abuse in Native American communities and promoting cultural awareness of native traditional and ceremonial uses of tobacco. She explained that tobacco settlement funds distributed to the IAD feed a competitive grant program that provides funding for commercial tobacco prevention and cessation programs statewide. She emphasized that tobacco prevention and cessation services are implemented by community members.

Ms. Moore presented a chart showing the history of funding for tobacco cessation programs in Native American communities, including funding levels from tobacco settlement

funds, IAD general funds and in-kind donations. Ms. Moore noted that the IAD hopes to increase in-kind donations to increase available funds in the grant pool. Ms. Moore added that the IAD is also seeking to expand existing sources of funding, including federal funds.

Ms. Moore stated that in fiscal year (FY) 2014, the IAD received 12 proposals for program funding totaling \$458,640. The IAD entered into seven intergovernmental agreements or professional services agreements, with funding totaling \$249,938. Ms. Moore said that the Department of Finance and Administration (DFA) mandated a 46 percent reduction in funding in December 2013. For FY 2015, the IAD received 15 proposals totaling \$606,795 in funding requests. The IAD entered into nine intergovernmental agreements or professional services agreements, with funding totaling \$268,178. Ms. Moore provided an overview of program funding recipients relative to smoking prevalence in the counties in which the programs are located. She further commented that according to a 2014 survey, youth tobacco use rates in the state are the highest among Native American populations as compared to other ethnic groups.

Ms. Moore presented a chart showing the different types of tobacco control programs for which the IAD provided funding in FY 2014. She stated that 35 percent of the funds were used for prevention; 30 percent were used for cessation; 25 percent were used for surveillance; and 10 percent were used for administration and training. Next, Ms. Moore described the objectives of several funded programs, including programs at the Pueblo of Isleta, Kewa Pueblo, Pueblo of San Ildefonso and Pueblo of Tesuque and in the Navajo Nation. Ms. Moore also discussed the impacts of the programs in their respective communities.

Finally, Ms. Moore identified a number of challenges for the tobacco cessation programs funded through the IAD. She indicated that the 46 percent reduction in funding to the program required the programs to modify their scopes of work and performance measures. She also identified challenges with the contract award process, in which there are two agreement options and three required agency approvals, which often take several months to complete. She additionally indicated that programs often face challenges resulting from personnel turnover, which requires additional training for incoming employees.

Ms. Moore indicated that for FY 2015, tobacco cessation programs are expected to use innovative approaches to accomplish their goals. According to Ms. Moore, the IAD expects to help tribes seek expanded sources of funding and to coordinate with the Indian Health Service on tobacco cessation projects. She indicated that at least nine intergovernmental agreements or professional services agreements have been awarded for FY 2015.

Committee members then discussed several specific issues with Ms. Redmond and Ms. Moore. A committee member asked why the DFA mandated a 46 percent reduction in funding for FY 2014. Ms. Moore explained that the reduction was the result of the adverse ruling against the state with respect to tobacco settlement revenues. Committee members discussed the consequences of reliance on earmarked funds for tobacco cessation projects. Another committee

member asked if the IAD has collected tobacco use data by tribe. Ms. Moore indicated that such research is possible.

Committee members asked whether tobacco surveillance programs are successful among children who are 13 years old. Ms. Moore indicated that youth smoking rates are dropping. For instance, she stated that between 2009 and 2011, there was a three percent reduction in smoking rates among young people.

A committee member asked whether electronic cigarettes have been considered as tobacco cessation tools for distribution to the public. Ms. Moore responded that at some pueblos, nicotine patches have been provided through tobacco cessation and prevention programs. Another committee member commented that tobacco cessation programs could still be more successful than electronic cigarettes in reducing nicotine use.

Electronic Cigarettes: Survey of Policy and Legislative Action in Other States

Ari Biernoff, assistant attorney general, Litigation Division, Office of the Attorney General, provided the committee with an update on the FDA's proposed regulations pertaining to electronic cigarettes. He noted that the public comment with respect to the proposed regulations is now closed.

Mr. Biernoff stated that under the proposed FDA regulations, electronic cigarettes would be considered to be tobacco products and would be regulated under federal law. The regulations would require health warnings with respect to nicotine and would impose age restrictions on the sale of electronic cigarettes. Some marketing restrictions would be placed on electronic cigarettes. For instance, distribution of free samples of electronic cigarettes would be prohibited.

Mr. Biernoff noted that a group of 40 attorneys general from throughout the country provided comments on the proposed regulations. He stated that they commented that the FDA should provide for restrictions beyond a ban on sales of electronic cigarettes to youth by regulating flavoring in electronic cigarettes. The group of attorneys general also requested more conspicuous health warnings with respect to electronic cigarettes.

According to Mr. Biernoff, about 40 states have prohibited the sale of electronic cigarettes to minors. He stated that New Mexico does not have such a prohibition. He also stated that a number of states, counties and municipalities have considered how to approach the regulation of electronic cigarettes. He noted, for instance, that some states have prohibited the use of electronic cigarettes in schools.

Mr. Biernoff indicated that about 12 states are considering taxing electronic cigarettes. Some states have proposed taxing electronic cigarettes similar to taxing tobacco cigarettes. Other states have proposed taxing electronic cigarettes at lower rates than the rates imposed for tobacco cigarettes, while others have proposed providing for tax exemptions for electronic cigarettes.

After the conclusion of Mr. Biernoff's presentation, a committee member asked whether the state could prohibit flavoring in electronic cigarettes. Mr. Biernoff responded that such a prohibition would not necessarily present a federal preemption issue, but future regulations could raise issues of federal preemption.

In response to a question from a committee member, Mr. Biernoff provided the committee with an update on the appeal of the arbitration decision affecting FY 2015 tobacco settlement revenues. He indicated that the Office of the Attorney General is awaiting a decision on its motions to vacate. He also stated that the arbitration process with respect to whether the state was diligent in its enforcement of the "Qualifying Statute" in 2004 could last at least two years. A committee member discussed the possibility of incorporation of electronic cigarettes into the definition of "tobacco" throughout existing state statutes.

Adjournment

There being no further business before the committee, the committee adjourned at 12:50 p.m.